

DEC 11 1967

In the

JOHN F. DAVIS, CLERK

**SUPREME COURT OF THE UNITED STATES**

October Term, 1967

No. 735

PERMA LIFE MUFFLERS, INC.  
PERMA LIFE MUFFLERS OF ARLINGTON, INC.  
PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.  
PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC.  
ROBIN HOOD OF GRAND RAPIDS, INC.  
ROBIN HOOD OF MUSKEGON, INC.  
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, t/a  
ROBIN HOOD MUFFLER SHOP  
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a  
MIDAS MUFFLER SHOP OF BATTLE CREEK  
CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS  
PIERCE MUFFLER SHOPS, INC.

*Petitioners*

v.

INTERNATIONAL PARTS CORPORATION  
MIDAS, INC.  
POWELL MUFFLER CO. INC.  
MUFFLER CORPORATION OF AMERICA  
NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER,  
ROBERT M. JACOB, HAROLD KRIEGER, IRWIN LISS

*Respondents*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

**REPLY TO BRIEF IN OPPOSITION**

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In the  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1967

No. 733

PERMA LIFE MUFFLERS, INC.  
PERMA LIFE MUFFLERS OF ARLINGTON, INC.  
PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.  
PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC.  
ROBIN HOOD OF GRAND RAPIDS, INC.  
ROBIN HOOD OF MUSKEGON, INC.  
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, t/a  
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*Preliminary Statement*

Respondents contend that the Court has no jurisdiction because the Petitioners failed to file the certified record provided for by Rule 22-3 of the Court's rules within the time prescribed by Section 2101(c) of Title 28 of the United States Code. They have even attempted to create the impression that the record has never been filed. This is not true. The certified record has been filed, and a request for

that record to the Court of Appeals was made prior to filing the Petition for Certiorari. The Court of Appeals, however, could not provide the record to file it together with the Petition. The failure to file a record however, does not constitute a jurisdictional defect inasmuch as the Petition itself was filed in time.

### RESPONDENTS HAVE PRESENTED NO SUBSTANTIAL REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

Respondents' Brief in Opposition to the Petition for Certiorari rests on a completely false foundation. The authorities and the record references which Respondents cite do not support their principal contentions, first that the *in pari delicto* defense is "firmly established" in antitrust cases, and second that the facts in this case make the application of the *in pari delicto* defense particularly appropriate.

#### I

Respondents cite a number of this Court's decisions to support their assertion that the *in pari delicto* defense is "firmly established" in antitrust cases. (Respondents' Brief at 12) These decisions, however, do not support that position. There is no "firmly established" defense of *in pari delicto* in antitrust cases.

It is enough to say that *Gibbs v. Baltimore Gas Co.*, 130 U.S. 396 (1889) and *Harriman v. Northern Securities Co.*, 197 U.S. 244 (1905) were not antitrust cases in the real sense of the word. Respondents' use of *Eastman Kodak Co. v. Southern Photo Co.*, 273 U.S. 359 (1927) appears to be a deliberate attempt to mislead. Respondents assert that in *Eastman Kodak* this Court "recognized" the *in pari delicto* defense "with approval". This is not so. Moreover, the language from this Court's opinion in that case (which the Respondents quote to support such assertion) is nothing more than this Court's resume of a jury instruction given by the District Court. In other words the quoted language repre-

sents part of this Court's statement of facts. The language does not represent either this Court's "recognition" or this Court's "approval" of the *in pari delicto* defense.

Southern Photo had won an award of treble damages under Section 7 of the Sherman Act. The Court of Appeals affirmed. Eastman asked this Court to review the decision. It challenged the competency of the proof offered by Southern as a measure of Southern's damage. John W. Davis, Eastman's attorney, argued that Southern could not use the profits it had earned as Eastman's customer to measure its losses for the period after Eastman refused to continue dealing with Southern, alleging, among other things, that Southern had during the prior period participated with Eastman in its unlawful monopoly. Nonetheless this Court affirmed the jury's treble damage verdict stating that "under the circumstances of this case" there was nothing in the trial court's "instructions [one of which was of an *in pari delicto* nature] of which [Eastman could] justly complain." [273 U.S. at 377-378]. Suffice it to say that this Court did not pass upon the validity of the *in pari delicto* instruction since the Court affirmed the judgment which Southern had won below, in spite of — and not because of — this instruction.

This Court's decisions beginning with *Kiefer-Stewart v. Joseph E. Seagram*, 340 U.S. 211 (1951) and ending with *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964) do not hold, as the Respondents assert, "... (1) that the *in pari delicto* defense does not apply unless both plaintiff and defendant were engaged in the identical alleged violation, and (2) that it does not apply if one of the parties to the alleged illegal agreement has been 'coerced' into participation." (Respondents' Brief at 13-14). Respondents' assertion to this effect represents a misconstruction of these cases. This Court has never sustained the *in pari delicto* defense in any of the antitrust cases which it has decided.

The cases beginning with *Kiefer-Stewart*, *supra*, and ending with *Simpson*, *supra*, are reviewed in the Petition for Certiorari and there is no need for extended rediscussion of

these authorities here. The most that Respondents can say about those cases is that the facts in some but not all of them were different from the facts in the case at bar. *Simpson*, supra, however, and the case at bar are almost precise parallels. The fact that Union Oil's sales exceeded \$347,000,000 is of little consequence. Respondent MIDAS was and is a significant distributor of automotive exhaust system parts whose business ran into millions of dollars. Indeed, the corporate Respondents represented at the time pertinent to this cause the fifth largest distributor of automotive exhaust system replacement parts in the nation. To be sure some exhaust system parts were available from other suppliers. The MIDAS Muffler however was not. And, to buy the MIDAS Muffler, Petitioners here were required to buy other exhaust system parts from the Respondents. They had no alternative to dealing with the Respondents if they wanted to buy and retail the MIDAS Muffler.

## II

Respondents' assertion that the application of the *in pari delicto* defense is particularly appropriate in the instant case (Respondent's Brief at 16) is as misleading as their assertion that such a defense is "firmly established" in antitrust law.

If the Respondents are correct, they have a right, free of private litigation, to offer a valuable product for sale on the condition that purchasers agree to observe understandings specifically condemned by Section 3 of the Clayton Act, i.e. that purchasers will not (1) deal in the goods of competitors and (2) will buy exclusively from the defendants. Respondents justify their assertion by claiming that purchasers who have agreed to these conditions are *in pari delicto* and have no right to sue because they "... freely, voluntarily and without coercion participated in and profited from the very activities claimed to be violative of the antitrust laws. . . ." [emphasis supplied]. These overgeneralized views of the Respondents ignore the practical realities and economics which surround their franchise

system of distribution. Petitioners, for example, have never claimed and do not now claim that there was anything unlawful about their purchases or sales of the Respondents' MIDAS Muffler alone; or Petitioners have never claimed that there was anything unlawful about the advertising which they published as part of the Respondents' franchise system. Plaintiffs have never even denied that they profited from their sales of the respondents' MIDAS Muffler. Respondents, however, have taken these facts and put them in a different context. They argue that since Petitioners voluntarily purchased Respondents' MIDAS Mufflers and profited therefrom, the Petitioners voluntarily participated in and profited from *unlawful activities*. Respondents gloss over the fact that Petitioners accepted the Respondents' exclusive dealing franchises in order to obtain and retain the right to buy Respondents' MIDAS Muffler; and that Petitioners' profits were derived from the sale of Respondents' MIDAS Muffler. Throughout this proceeding Respondents have conscientiously ignored the fact that they required Petitioners to pay more for exhaust system parts other than mufflers than Petitioners would have paid had they purchased these parts from the Respondents' competitors. The vice of the Respondents' argument is that it proceeds on the assumption that there is nothing wrong with compelling franchisees to adhere to the unlawful terms of an agreement. Their argument appears to be that since Petitioners' purchases of exhaust system parts other than mufflers were enforced pursuant to an agreement which was voluntarily entered into in the first instance there was nothing "coercive" about those purchases. Lest there be any doubt about the coercive aspects of the Respondents' exclusive dealing agreements one need merely refer to the Court of Appeals opinion below (Appendix B at 17, Petition for Certiorari):

"We think the finding, [of the District Court] 'The evidence is uncontroverted in demonstrating that plaintiffs were free to purchase either product, but chose Midas', is erroneous. Plaintiffs' freedom in

this respect was forfeited by the terms of the franchise agreements. The record contains much evidence that there was a continuing effort on the part of Midas to enforce the exclusive dealer requirement."

Again, the facts which establish coercion are cited in the Petition for Certiorari and there is no need for an extended rediscussion of these facts here. We do not think that any Court, particularly this one, has ever accepted the argument that when an agreement is voluntarily entered into in the first instance it does not matter what coercive influences are subsequently utilized to enforce the unlawful terms of that agreement. Yet this is precisely the nub of Respondents' argument; nor does the fact that each party had the right to terminate the franchise agreement on thirty days notice aid this argument.

Respondents make the assertion in their brief that the "purpose of the antitrust laws" will be furthered by application of the *in pari delicto* doctrine in this case. (Respondents' Brief at 22) The assertion is made without exception. We do not understand it, particularly in light of the fact that the respondents are charged with, among other things, a *per se* type violation of the antitrust laws — the use of a tying agreement. The nation's antitrust policy is firmly disposed against the use of such devices, (which "serve hardly any purpose beyond the suppression of competition." *Northern Pacific Railway Company v. United States*, 356 U.S. 1 at p. 6 (1958)). This policy will not be furthered by allowing the Respondents to maintain the position that they are not subject to the liabilities of a private action. In this regard the language of the Government's *amicus* brief in *Amplex of Maryland, Inc. v. Outboard Marine Corporation*, No. 668 is in point (at page 4):

"In view of the variety and scale of the nation's commerce, it would be virtually impossible for the Government to discover, investigate and proceed against every scheme proscribed by the antitrust laws. Private treble damage suits serve the impor-

stant public purpose of supplementing the government's enforcement activities and thus play a major role in obtaining compliance with those laws. It is therefore a matter of concern to the United States when private enforcement of the antitrust laws has proven ineffective in any significant respect. Such a situation has developed with respect to the prescription of exclusive dealing arrangements."

### III

Several other points must be noted. At page 18 in their Brief, Respondents carefully overlook the fact that they terminated Petitioner PIERCE solely because he refused to purchase all of his tailpipes and exhaust pipes from them. Respondents also overlook the circumstances under which the Petitioners terminated their franchises. Petitioners generated profits from their sale of the Respondents' MIDAS Muffler, prior to 1959. One of the paramount reasons for this was the unique guarantee offered by the Respondents. Respondents' cost of the guarantee program in late 1958, when guarantee returns came pouring in at an alarming rate, increased tremendously. To bridge this tide Respondents transferred the cost of the guarantee program to their franchisees by requiring them to defray 50% of the wholesale price of each muffler replacement. This 50% equalled (approximately) Respondents' entire manufacturing cost of the Muffler replacements. At the 50% rate Petitioners' profits were reduced by \$60,000 in 1959 alone. Petitioners recognized that if this rate continued there would be no profits left from their sale of the Respondents' MIDAS Muffler. The guarantee change amounted to a constructive termination especially in light of the fact that Petitioners were already paying Respondents more for some exhaust system parts than they should have paid (or would have paid) Respondents' competitors. Petitioners could not seek substitutes without terminating their franchises in view of the threats previously made by Respondents. To have purchased from competitors without terminating their fran-

chises in an orderly fashion would have produced nothing more than chaos.

At page 24 of their Brief Respondents assert that their franchise agreements do not fall within the spirit of Section 1 of the Sherman Act, 15 U.S.C. 1. They contend that in the complaint Petitioners asserted nothing more than a "*horizontal conspiracy*" [their emphasis not ours]. This is factually incorrect. In the complaint petitioners asserted the following:

"COUNT-ONE

"During the period beginning about January 1, 1955, to and including the date hereof, the defendants and other co-conspirators unknown violated Section 1 of the Sherman Act (15 U.S.C. 1) in that they have combined together, and/or agreed, and/or contracted, and/or planned, and/or conspired to unlawfully restrain and substantially lessen competition in the sale of automobile exhaust parts and allied automobile products as hereinbefore defined in interstate commerce, or contracted, and/or planned, and/or conspired unlawfully to fix and maintain prices of automotive exhaust parts and to create and/or induce a commercial boycott and/or boycotts, the effects of which were to unlawfully restrain and substantially lessen competition in the sale of automotive exhaust parts and allied automobile products as hereinbefore defined in interstate commerce."

Thereafter the Petitioners alleged the divers means methods and acts by which Respondents violated Section 1. Among the acts which Petitioners alleged in addition to a conspiracy among Respondents were the Respondents' acts of entering into franchise agreements with hundreds of franchisees. These agreements are the subject of Petitioners' Sherman Act claim as well as Petitioners' Clayton Act claim. Respondents' reliance that the Complaint is based simply on a "horizontal conspiracy" rather than vertical agreement represents another fundamental misconception

by Respondents of the nature of the complaint. The complaint must be read in its entirety and cannot be divided into individual unrelated pieces.

### CONCLUSION

We believe the record shows a clear violation of the anti-trust laws as well as the right to recover. We respectfully request that Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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